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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARON ANTHONY HOOKS, Defendant and Appellant.	E034316 (Super.Ct.No. RIF 104555) OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed with directions.

Beatrice C. Tillman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Marilyn L. George, Deputy Attorney General, and Janelle Boustany, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Daron Anthony Hooks (defendant) was charged with (1) the attempted murder of Hugo B. under Penal Code[1] sections 664 and 187, subdivision (a) (count 1); (2) the attempted murder of an "unknown male," later identified as "Gauche," under sections 664 and 187, subdivision (a) (count 2); (3) discharging a firearm at an occupied motor vehicle under section 246 (count 3); and (4) being a felon in possession of a handgun under section 12021, subdivision (a)(1) (count 4). Additionally, with regard to counts 1 to 3, the information alleged that (1) defendant personally discharged a firearm causing great bodily injury, within the meaning of section 12022.53, subdivision (d); (2) the crimes were committed for the benefit of a street gang under section 186.22, subdivision (b); and (3) the crimes were committed because of the victim's personal characteristic (a hate crime enhancement) under section 422.75, subdivision (c).

A jury convicted defendant of all the charges, found that the attempted murders were premeditated, and found the enhancement allegations true.

On appeal, defendant contends that (1) defendant was denied a fair trial by the in-court identification which was tainted by suggestive photographic lineup procedures; (2) the trial court erred in denying defendant's request to bifurcate the gang enhancement allegation from the substantive charges; (3) the trial court erred in allowing the prosecution's gang expert to express his opinion regarding defendant's motive in committing the alleged crimes; (4) the prosecutor asked improper hypothetical questions

[1] All statutory references are to the Penal Code unless otherwise specified.

of the gang expert; (5) the trial court erred in instructing the jury on the hate crime enhancements; and (6) the trial court erred in imposing a concurrent sentence for count 4 under section 654. For the reasons set forth below, we shall strike the sentences imposed on count 4 and under the hate crime enhancements, and remand the case to the trial court to impose a proper sentence for the hate crime enhancements. In all other respects, the judgment shall be affirmed.

FACTUAL AND PROCEDURAL HISTORY

At around 9:30 p.m. on June 25, 2002, Hugo Belmontes and a friend named Gauche went to Bordwell Park in Riverside to obtain marijuana. They found the marijuana in a place where Gauche had hidden the drug. Two men approached them as Belmontes and Gauche were walking toward their truck. One of the men said that they were 1200 Blocc Crip, a gang, and asked Belmontes and Gauche where they were from. Belmontes, who knew that the 1200 Blocc gang did not like Mexican people, responded, "We don't gang bang." People nearby told Belmontes and Gauche to "[g]et out of [their] park." Belmontes walked up to one of the two men, later identified as defendant, in an attempt to shake defendant's hand. Defendant refused to do so. Belmontes explained that he was trying to keep "it cool." As Belmontes and Gauche were leaving the area, defendant said, "What did you say?" The other man stood nearby. Then, defendant fired gunshots at Belmontes. As Belmontes was running away, he heard seven or eight more gunshots. Belmontes was shot.

Gauche eventually drove Belmontes home. Belmontes was hospitalized and treated for his gunshot wounds. The truck driven by Gauche had bullet holes on the passenger side and in the windshield.

After the shooting incident, Gauche could not be found. Belmontes identified defendant as the shooter. Belmontes was shown three different photographic lineups. Initially, he identified another man as the person who looked like the shooter, but later stated that he was not sure enough to testify in court about that identification. Several days later, when the police showed Belmontes another set of photographic lineups, he positively identified defendant as the shooter. Belmontes stated that he was 100 percent certain of that identification, and that he was willing to testify in court that defendant was the person who shot him.

The parties stipulated that Nicole S., an 11-year-old girl, heard several gunshots around 10:00 p.m. on June 25, 2002, coming from the area of Bordwell Park behind her home. After the shots were fired, she heard a car racing down her street. From her front window, she saw a dark-colored sport utility vehicle drive by her home at a high rate of speed. It stopped in front of another home on her street. The front passenger jumped out and ran to a green trash can, lifted the lid, and threw an object into it. The passenger returned to the car and the driver sped off. Nicole described the passenger as a black male juvenile approximately 13 to 15 years old, thin and about five feet tall. Nicole's mother called the police.

The police recovered a semiautomatic handgun from a trash can near the location of the shooting. Defendant's fingerprints were on one of the beer bottles recovered from the picnic tables at the park.

The parties stipulated that on September 14, 2001, defendant was convicted of the felony of possession of controlled substances, in violation of Health and Safety Code section 11350. The parties also stipulated that the 1200 Blocc Crip and its subsets, the Georgia Street Mob and the Cripping Young Gangsters, are criminal street gangs as defined under section 186.22.

Defendant's friend, 20-year-old Tanisha Law, testified that she was with defendant on the day of the incident. She recalled that they were at the park only in the afternoon. Some of defendant's friends were there. Defendant had a beer. They left in the afternoon and went to an amusement park in the evening. Law stated that she dropped defendant off at his home around 10:00 p.m. As far as she knew, defendant was not in a gang. She did not know if his friends were in a gang.

ANALYSIS

I. The In-Court Identification of Defendant Was Proper

Defendant contends that he was denied a fair trial because the identification procedures were coercive and impermissibly suggestive and rendered the in-court identification unreliable.

Respondent, without providing any response to defendant's contention, simply argues that defendant has waived his right to contest the in-court identification by failing

to raise this issue in the trial court. Although defendant concedes that his counsel failed to object "to the admission of the unduly suggestive identification procedures," the principles of waiver do not bar review of this issue because: (1) "[A]n objection is not required when the error is capable of affecting the substantial rights of a defendant[;]" (2) the error deprived defendant of due process of law; (3) if the issue was not properly preserved for appellate review, the issue must be addressed under a claim of ineffective assistance of counsel (IAC); and (4) an appellate court has the inherent power to resolve an issue absent an objection in the trial court. Although we agree with the respondent that, by failing to object below, defendant has waived this claim of error on appeal, (Evid. Code, § 353; *People v. Rogers* (1978) 21 Cal.3d 542, 548), we – unlike respondent – will address the issue on the merits to foreclose any future claim of IAC by defendant.

The California Supreme Court has often reiterated the principles governing the admission of identification evidence: "Constitutional reliability, we said, depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. [Citation.] 'If, and only if, the answer to the first question is yes and the answer to the second is no, is the

identification constitutionally unreliable.'" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1216, citing *People v. Gordon* (1990) 50 Cal.3d 1223, 1242.)

The court has acknowledged that the applicable standard of review on a determination regarding suggestiveness is unsettled. (*People v. Johnson, supra,* 3 Cal.4th at pp. 1216-1217.) Nevertheless, in the present case, whether the standard of review is deferential or de novo, we conclude that the identification procedures were constitutional because they were not unduly suggestive or coercive.

In this case, Belmontes was shown three photographic lineups on July 2, 2002, one week after the incident. These photographic lineups were designated as "A," "B," and "C." The interview conducted at the police station was videotaped and a portion of the interview was shown to the jury.

During the interview, Belmontes identified a person who looked like the suspect, put his initials by the photograph and circled it. The person identified was not defendant. At that time, Belmontes indicated that he was positive that the person in the photograph was the person who shot him. Belmontes indicated that he could tell the person in the photograph was the shooter because the shooter had "hair like Usher[**2**] and everything and he was like with somebody that looked like him, too."

Later in the same interview, however, the following dialogue ensued:

"[Detective] JOSEPH: Okay, I may wanna talk to you some more later, I don't

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2 "Usher" is an African-American recording artist.

know right now, I'm gonna have to sit and kinda like pour [*sic*] over what I got, I gotta do some research on this guy here that you, you identified. Have you ever seen this kid before that shot ya?

"BELMONTES: Never.

"JOSEPH: Okay.

"BELMONTES: I can't really say that he was exactly the guy but he's the one that reminds me of the guy that shoot me, exactly the same.

"JOSEPH: Looks exactly the same.

"BELMONTES: Exactly the same. The hair, everything in the lips, his nose . . . .

"JOSEPH: So you're not a hundred percent sure that he's the guy.

"BELMONTES: His nose exactly the same. . . .

"JOSEPH: Well I'm saying either that is him or it isn't. Is it exactly the same or he just looks like the guy.

"BELMONTES: He like, if I see him out on the street I'll say 'you shot me.'

"JOSEPH: Hm-hm well what I'm saying here is you, you looked at these pictures, what I need to know is can you go to court and testify that this is the guy that shot you.

"BELMONTES: No, not really. [Shakes head.] To tell you [the] truth."

Based on this exchange, defendant argues that Detective Joseph's "leading questions . . . gave Belmontes no choice but to retreat from his previously positive identification." The transcript of the interview, however, belies defendant's claim.

As provided above, it was Belmontes who *first* indicated that he could not "really

say that he was exactly the guy . . . .” This statement was not as a result of any suggestion or coercion by Detective Joseph. Based on Belmontes’s claim that he was uncertain, Detective Joseph followed up with other questions – as he should have. We simply fail to see how this line of questioning put any pressure on Belmontes to waiver from his initial identification of the person who shot him.

On July 5, the police presented Belmontes with more photographic lineups. Belmontes picked defendant as the shooter. This time, Belmontes indicated that he was 100 percent certain and that he was willing to testify in court that defendant was the person who shot him. This interview was not recorded. As to this photographic lineup, defendant can cite to no evidence of coercion or suggestiveness.

Based on the above, we hold that the identification procedures were not improperly suggestive. Accordingly, we need not proceed to the second step to decide whether the identification was reliable under the totality of the circumstances. (*People v. Johnson, supra,* 3 Cal.4th at p. 1218.)

Moreover, because we hold that the identification procedures were proper, we need not address defendant’s argument that the in-court identification of defendant was somehow tainted by the previously “suggestive photographic identification.”

II. The Trial Court Did Not Err in Denying Defendant’s Request to Bifurcate the Trial

Defendant contends that the trial court erred in denying his pretrial request to bifurcate the gang enhancement allegations because the admission of the gang evidence

was unduly prejudicial and a denial of due process of law. Respondent's brief provides little assistance to our analysis. Nevertheless, we hold that the trial court's denial of defendant's request for bifurcation was proper.

"Case law holds that where evidence of gang activity or membership is important to the motive [of the underlying crime], it can be introduced even if prejudicial. (*People v. Dominguez* (1981) 121 Cal.App.3d 481, 498-499 [175 Cal.Rptr. 455]; see also *People v. Frausto* (1982) 135 Cal.App.3d 129, 140 [185 Cal.Rptr. 314].)" (*People v. Martin* (1994) 23 Cal.App.4th 76, 81 (*Martin*).)

In a recent decision, *People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*), the California Supreme Court provided as follows:

"In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (the STEP Act). [Citation.] 'The impetus behind the STEP Act . . . was the Legislature's recognition that "California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to the public order and safety and are not constitutionally protected." [Citation.]' [Citation.]" (*Hernandez*, *supra*, 33 Cal.4th at p. 1047.)

"As relevant here, the STEP Act prescribes increased punishment for a felony if it was related to a criminal street gang. [Citation.] '[T]o subject a defendant to the penal consequences of the STEP Act, the prosecution must prove that the crime for which the

defendant was convicted had been "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." [Citation.] [Fn. omitted.] . . .' [Citation.]" (*Hernandez*, *supra*, 2004 LEXIS 7235 at pp. *8-*9.)

The Supreme Court then went on to note that, "[i]n cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation – including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like – can help prove **identity**, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Hernandez*, *supra*, 2004 LEXIS 7235 at pp. *14-*15, italics original, bold added.)

In this case, the following gang evidence was presented:

Gar Toussaint, a gang expert, testified about the 1200 Blocc Crips. The gang, which is African-American, has a territory that includes the east side of Riverside – the area of University east of the 91 freeway, north of Iris to Third Street towards Chicago. Bordwell Park is within the turf of the 1200 Blocc Crips. The Georgia Street Mob and

the Cripping Young Gangsters are subsets of the 1200 Blocc Cripps. Members of the 1200 Blocc Crips refer to themselves by the number "12," which refers to 12th Street, the gang's main location of origin. The number "21" refers to the 2100 block of Georgia Street, for the Georgia Street Mob. The main rival to the 1200 Blocc Crips is a Hispanic gang, larger than the 1200 Blocc Crips, called East Side Rivas. The subsets of East Side Rivas are called Tiny Dukes, Patterson Park, Clique Los Primos and 14th Street.

Moreover, Toussaint explained that gang members earn respect by committing crimes. For over a decade, there has been an on-going feud between the African-American and the Hispanic gangs on the east side. The crimes committed between the two gangs range from assault to homicide. Defendant, with a gang moniker of Young Dice, is a member of the 1200 Blocc Crips.

In March of 2002, three months prior to the incident at issue, defendant provided information to the police during a murder investigation of a Hispanic male. Toussaint opined that defendant could be ostracized or killed for providing that type of information. If defendant was the person who shot Belmontes, this act would have placed defendant in good standing with his gang.

Brian Callahan, a deputy sheriff in charge of housing defendant during the trial, testified that there was gang graffiti in the holding cell where defendant was housed. The words, "1200 Blocc Crip" were inscribed and the number "187," the section in the Penal Code for murder, was below the word "Crip." Underneath the "187" were the initials "ESR" (East Side Rivas) and below that "TDKS" (Tiny Dukes) and below that "CLPS"

(Clique Los Primos). All of the initials were "x'd out." The deputy testified that no one other than defendant was in the holding cell.

In this case, from the gang evidence summarized above, it is clear that the evidence of gang activity was critical to connect defendant to the shooting incident of Belmontes. On the night of the incident, defendant and a friend – who identified themselves as 1200 Blocc Crip – approached Belmontes and Gauche and asked where they were from – a common question to check if persons are from rival gangs. Thereafter, although Belmontes and Gauche stated that they were not gang members, and did nothing to provoke defendant, defendant fired gunshots at Belmontes and Gauche. Moreover, while defendant was being held in jail, he acknowledged his membership in the gang and disdain for the rival Mexican gangs. As explained by the gang expert, the shooting in front of other gang members could have elevated defendant's status within his gang – which was relevant to show motive for the senseless and unprovoked shooting. Therefore, a single proceeding on the shooting and the gang allegation was proper because evidence of defendant's gang activities was critical to establish the identity of the defendant and defendant's motive for the shooting.

We hold that a combined trial for the gang enhancement and murder charge was proper.

III. The Trial Court Properly Allowed the Gang Expert to Express an Opinion Regarding Defendant's Motive for Committing the Crime

Defendant contends that the trial court erred in allowing the prosecution's gang

expert, Toussaint, to express his opinion regarding defendant's motive for committing the crime.

A. Standard of Review

A decision of a trial court to admit expert testimony "will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People v. Kelly* (1976) 17 Cal.3d 24, 39.) Typically, an abuse of discretion will not be found "except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316, italics omitted.)

B. The Trial Court Did Not Abuse Its Discretion

Evidence Code section 801 sets forth the grounds for the admission of expert opinion testimony. It states: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his [or her] testimony relates, unless an expert is precluded by law from using such matter as a basis for his [or her] opinion."

In *People v. Gamez* (1991) 235 Cal.App.3d 957, overruled on another ground in *People v. Gardeley* (1996) 14 Cal.4th 605, 624, footnote 10, a court noted: "'[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men [or women] of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. [Citations.]'" (*Gamez, supra,* at p. 965, quoting *People v. Cole* (1956) 47 Cal.2d 99, 103.)

In this context, defendant argues that the trial court abused its discretion in admitting Toussaint's testimony "because a person's motive under the facts of this case is not the sort of evidence that is beyond common experience and in this case, the expert's opinion would not assist the trier of fact." Respondent does not address this issue; instead, respondent simply argues that the evidence was admissible because the issue regarding motive was relevant. Again, we, without any assistance from respondent, must address defendant's argument.

Here, Toussaint testified that prior to the incident at issue, defendant had provided the police with information about a previous homicide committed by another member of the 1200 Blocc gang involving a Hispanic victim. Such cooperation with the police would have put defendant in a poor position with his gang. The prosecutor followed up with the following question: "[A]ssuming the defendant did shoot Hugo Belmontes, would that be an act that would put [defendant] on the road to good standing with the

gang?" Toussaint answered, "Yes, it would." Defendant takes issue with Toussaint's testimony "because the expert's opinion related to [defendant's] motive was unnecessary to assist the trier of fact . . . ." Defendant argues that "a person's motive under the facts of this case is not the sort of evidence that is beyond common experience . . . ." We disagree.

Although defendant may believe that evidence regarding gang culture may be "common experience," we recognize that a majority of jurors – who are not involved in the criminal justice system – may not be aware of gang culture and behavior. Expert testimony is often used in regard to gang sociology and psychology. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370; *People v. Gamez, supra,* 235 Cal.App.3d at p. 966; *People v. McDaniels* (1980) 107 Cal.App.3d 898, 904-905.) Moreover, expert testimony is admissible "*even though it encompasses the ultimate issue in the case*." (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1371, emphasis added.)

Therefore, we reject defendant's argument and hold that, under the totality of the circumstances of this case, we cannot say that the court exercised its discretion in an arbitrary, capricious or patently absurd manner.

IV. The Trial Court Properly Allowed the Prosecutor to Pose Hypothetical Questions to the Gang Expert

Defendant contends that "the prosecutor's use of improper hypothetical questions prejudicially deprived [defendant] of a fair trial and reversal is required." In essence, defendant claims that the conviction must be reversed because the hypothetical questions

were not based on an assumption based on proven facts, but were premised on defendant's guilt as the shooting. We disagree.

Within limits, examination of an expert witness with hypothetical facts is permissible. "'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however.' [Citation.] 'A hypothetical question . . . may be "framed upon any theory which can be deduced" from *any* evidence properly admitted at trial, including the assumption of "any facts within the limits of the evidence," and a prosecutor may elicit an expert opinion by employing a hypothetical based upon such evidence.' [Citations.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 449; see also *People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.)

In this case, the prosecutor presented several hypothetical questions to Toussaint, the gang expert, asking him to assume that defendant had shot Belmontes. Based on the premise that defendant was the shooter, Toussaint was asked his opinion as to whether defendant was an active member of the 1200 Blocc Crips, defendant's level of membership in the gang, defendant's motive for the shooting, whether the crime was committed in association with the gang, and whether the crime benefited the gang.

For example, the prosecutor asked Toussaint to assume that defendant shot Belmontes, then "[a]ssuming that he's the one that committed this crime, what does that say about his level of membership on the 1200 Blocc Crip?" Toussaint replied:

"It would show that he's very committed to the gang. It shows that he's trying to earn respect within the gang and that he's showing the territory that's claimed by the gang to not only the individual that would be the victim that was shot, but also the members of the community and rival gangs."

Here, the questions posed by the prosecution were based on an assumption that could be deduced from the evidence presented – that defendant was possibly the shooter of Belmontes – Belmontes testified that defendant was the person who shot him. As stated above, "'[a] hypothetical question . . . may be "framed upon any theory which can be deduced" from *any* evidence properly admitted at trial, . . .'" (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 449 and *People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.)

Moreover, the trial court explained to the jurors exactly how they were to view hypothetical questions. The court told the jurors that counsel may ask a hypothetical question in examining an expert, but in permitting this type of questioning, the court "does not rule and does not necessarily find that all the assumed facts have been proved." Rather, the jurors had to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If the jury "should decide that any assumption in a question has not been proved," it had to "determine the effect of that failure of proof on the value and the weight of the expert opinion based on the assumed facts." The trial court gave similar instructions in its concluding instructions.

Additionally, on cross-examination, Toussaint made it clear that the answers to the hypothetical questions had nothing to do with whether defendant was the person who shot Belmontes.

Therefore, we hold that the trial court properly allowed Toussaint to answer the hypothetical questions.

V. The Trial Court Erroneously Instructed the Jury Regarding the Hate Crime Enhancement

Defendant contends that the true finding on the hate crime enhancement allegation must be reversed and the additional punishment stricken because the trial court's special jury instruction was facially incorrect in that it failed to inform the jury on a crucial element of the hate crime allegation – that the person who committed the crime *voluntarily acted in concert with another*. (§ 422.75, subd. (c).) Respondent concedes. However, respondent contends that the instruction was proper to support a hate crime enhancement under section 422.75, subdivision (a). We agree with respondent.

Section 422.75, subdivision (a), provides for a sentence enhancement where a felony is attempted or committed because of the victim's race, color, religion, nationality, country of origin, ancestry, disability or sexual orientation. Section 422.75, subdivision (c) provides for an even greater sentence enhancement for such felonies where the defendant "voluntarily acted in concert with another person, either personally or by aiding and abetting another person."

The information alleged that defendant committed and attempted to commit the crimes in counts 1, 2 and 3 "voluntarily in concert with another person" because of Belmontes's race, color, religion, etc. under section 422.72, subdivision (c). The jury, however, was instructed:

"It is alleged in Counts 1, 2, and 3 that the defendant committed the crimes therein because of the victim's actual or perceived race, color or ancestry.

"The victim's race, color or ancestry does not need to be the only motive for the commission of the crime. Multiple concurrent motives may exist. When multiple concurrent motives exist, the prohibitive bias need only be a substantial factor in bringing about the crime.

"If you find the defendant guilty of the crime charged in Counts 1, 2, or 3, you must determine whether or not the victim's actual or perceived race, color or ancestry was a substantial factor in the commission of the offense.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

Thus, the jury was *not* instructed to determine whether defendant was acting "voluntarily in concert with another person" in committing the alleged crimes. The verdict forms for the race enhancements, however, provided for a finding that the defendant "did commit the offense *voluntarily in concert with another person* because of the victim's race, . . ." (Italics added.)

The failure to instruct the jury to determine whether defendant "voluntarily acted in concert with another person" was error; respondent does not contend otherwise. Respondent, however, in a supplemental respondent's brief contends as follows: "[A]lthough the four-year term imposed for the hate crime [enhancement under section 422.75, subdivision (c)] should be stricken, there is no basis for not imposing a hate crime enhancement under the 'lesser' provision contained in Penal Code section 422.75, subdivision (a), which specifies punishment of 1, 2 or 3 years." We agree.

As provided above, section 422.75, subdivision (a), provides for a sentence enhancement where a felony is attempted or committed because of the victim's race, color, religion, nationality, country of origin, ancestry, disability or sexual orientation. Unlike subdivision (c), subdivision (a) does not contain the phrase, that defendant "voluntarily acted in concert with another person, either personally or by aiding and abetting another person." Therefore, the jury instruction provided above was sufficient for a hate crime enhancement under section 442.75, subdivision (a).

Therefore, we hold that the hate crime sentence enhancement imposed under section 422.75, subdivision (c) be stricken, and the case be remanded to the trial court to determine the sentence enhancement under section 422.75, subdivision (a).

VI. The Trial Court Erred in Imposing Concurrent Sentences

Defendant contends that the trial court's imposition of concurrent sentences for the offense of being a felon in possession of a gun, in addition to the gun use enhancements, violated the ban on multiple punishments under section 654. Defendant argues that the

three-year concurrent term for being a felon in possession of a gun should be stricken. Respondent concedes.

Therefore, the three-year concurrent term imposed on count 4 is ordered stricken.

DISPOSITION

The sentences imposed on count 4 and under the hate crime enhancements under section 422.75, subdivision (c) are ordered stricken. The case is remanded for the trial court to determine a sentence enhancement under section 422.75, subdivision (a). Thereafter, the trial court is ordered to prepare an amended abstract of judgment and the clerk of the superior court is directed to forward a copy of the amended abstract of judgment to the appropriate authorities. In all other respects, the judgment is affirmed.

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s/Ward
J.

We concur:

s/Hollenhorst
Acting P. J.

s/King
J.